No. 83-56

In the Supreme Court of the United States

OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

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Respondents and amici make little effort to answer our arguments that this case does not satisfy traditional estoppel principles, much less involves "affirmative misconduct" as that term has been construed in this Court's decisions. Instead, they offer a host of points in support of their contention that the Court should depart from its longstanding refusal to invoke equitable estoppel against the government. None of the points raised suggests that the Court should abandon the considered principle that the government may not be equitably estopped from enforcing the law. Nor do the briefs succeed in explaining why it would be appropriate to depart from the general rule in order to free CHS from the obligation to repay the Medicare funds it received for expenses already reimbursed under another federal program.

1. Respondents assert (Br. 11) that our position is based on the premise that "the government can do no wrong." That characterization is incorrect. Indeed, the very problem in this and similar cases is that government employees and agents *do* make errors in the course of performing their duties. The point at issue here is whether such errors should disable the government from relying on relevant statutes and regulations. As we explained in our opening brief (Gov't Br. 18-26), there are strong reasons, grounded in both policy concerns and constitutional considerations, for the courts to refrain from applying principles of equitable estoppel to the government in those cases.[1]

Respondents attempt to minimize the importance of the requirements imposed by statutes and regulations. They vigorously criticize what they characterize as the Secretary's emphasis on the "sanctity" of her regulations and the need for "blind adherence" to them, as well as the Secretary's purported compulsion "blindly and rigidly" to enforce those regulations (Resp. Br. 18, 19). Amici, while not openly critical of the Secretary's attempt to enforce regulations, urge that estoppel in this case would not offend the

[1]Respondents contend (Br. 29) that estoppel is necessary to ensure that government employees will learn how to do their jobs correctly. But it is inappropriate for the courts to prevent the government from enforcing the law in the hope that such "discipline" will have the effect of reducing the number of government errors in the future. While such "punitive" estoppel might occasionally lead to increased supervision of government employees and improved performance, there is no assurance that this will occur; instead, the result could be a sharp decline in the willingness of government agencies to make efforts to provide assistance to citizens. See Braunstein, *In Defense of a Traditional Immunity: Toward an Economic Rationale for Not Estopping the Government*, 14 Rutgers L.J. 1, 31-39 (1982). In the Medicare program, for example, intermediaries might simply decline to answer providers' inquiries, rather than risk estoppel in the event the advice proved to be erroneous. See *Schweiker* v. *Hansen*, 450 U.S. 785, 790 & n.5 (1981).

principle of separation of powers because no congressional mandate forbids payment of the funds at issue. National Association for Home Care, etc. (NAHC) Br. 7.

These comments reflect an inappropriate disregard for the Secretary's responsibilities to enforce the law and to administer the Medicare program in a reasonable and consistent manner. The fact that a government employee or agent has rendered erroneous advice does not remove the Secretary's broader enforcement and administrative responsibilities. Even if such advice might lead to estoppel of a private party (and we have shown it would not in this case, see Gov't Br. 26-36), this Court has stressed that "the Government is not in a position identical to that of a private litigant with respect to its enforcement of laws enacted by Congress." *INS* v. *Hibi*, 414 U.S. 5, 8 (1973). Accord, *United States* v. *Mendoza*, No. 82-849 (Jan. 10, 1984), slip op. 5.

Contrary to the suggestion of amici (NAHC Br. 7), the Secretary's responsibilities are not confined to enforcement of what appears on the face of the Medicare statute. Congress has delegated to the Secretary the authority to define reimbursable "reasonable cost" under the Medicare program. See Gov't Br. 5. In view of that express delegation of substantive authority, the Secretary's determinations are entitled to "legislative effect." *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 44 (1981). Moreover, Congress provided expressly in the Medicare statute for the reopening of reimbursement determinations in the case of overpayments or underpayments. See Gov't Br. 6. Thus, precluding the Secretary from recovering from CHS for reimbursed expenses not covered by Medicare *would* be contrary to the express mandate of Congress. Indeed, even if there were no statutorily mandated recovery mechanism, it could hardly be consistent with the legislative intent for a court to relieve a provider of any obligation to repay when it has claimed

and received reimbursement for the same expenses under two different federal programs.[2]

2. Amici contend (NAHC Br. 9-10, 13-14) that allowing the Secretary to recover the overpayments CHS received would be inconsistent with the policy and structure of the Medicare program. They stress that providers are expected to consult with intermediaries and that they benefit from certainty.

Recovery of the overpayments in this case is in no way inconsistent with the policy and structure of the Medicare program. As we noted above, Congress chose not to specify in detail the expenses that would be reimbursable under Medicare, but delegated that responsibility to the Secretary. Under such a statutory scheme, there cannot always be complete certainty about the treatment of a given cost. The Secretary must develop principles of reimbursement through regulations, informal guidelines, interpretation, advice, and adjudication. Congress expressly recognized the potential for error in such a system and the need for a corrective mechanism; it therefore prescribed reopening and recovery in the case of overpayments and underpayments. That congressionally mandated process is simply inconsistent with

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[2]Respondents suggest (Br. 16) that CHS in fact had a substantive entitlement to reimbursement for the salaries of the CETA employees and that the only dispute is over a technical question of offset to the amount claimed. CHS presumably would have been entitled to Medicare reimbursement for the salaries if it had not also received CETA funds to cover them. But once CHS claimed and received the CETA funds, there was no substantive entitlement to receive Medicare funds for the same expenses.

Respondents also contend (Br. 17) that estoppel of the Secretary in this case will have no effect on the public treasury. This assertion is both irrelevant (see *INS* v. *Miranda*, No. 82-29 (Nov. 8, 1982), slip op. 5) and incorrect. As respondents acknowledge, Congress would have to appropriate funds to cover any shortfall in the Medicare trust fund.

the theory that a provider is entitled to finality in connection with every reimbursement determination.[3]

Furthermore, while a provider may consult with its intermediary, such consultation does not eliminate any obligation to return funds that the provider was not entitled to receive. Of course, intermediaries are expected to perform their statutory duties competently, and it appears that in most cases they fulfill these expectations and render correct advice. But the statutory and regulatory provisions for reopening make it clear that intermediaries do not have the final word on interpretation of the Medicare statute and regulations.[4] Ultimately the provider must exercise its own

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[3]Amici contend (NAHC Br. 11-13) that the provisions for reopening of reimbursement determinations and recovery of overpayments are meant only to allow correction of estimation errors or oversights in the computation of interim payments. That contention, which was not raised in the courts below, is incorrect. The statutory provision and the Secretary's regulation are not so narrowly confined on their face, and amici cite no legislative history that would support their reading. In the past, the Secretary has applied the reopening provisions to recover overpayments made because of prior erroneous interpretations of the Medicare statute and regulations. See, *e.g.*, *Abbott-Northwestern Hospital, Inc.* v. *Schweiker*, 698 F.2d 336, 338-339 (8th Cir. 1983); *River Garden Hebrew Home for the Aged* v. *Califano*, 507 F. Supp. 221 (M.D. Fla. 1980). It would be peculiar indeed if the recovery provisions did not apply to all types of overpayments, including those that result from a provider's or an intermediary's incorrect interpretation of the statute.

[4]Both respondents and amici characterize intermediaries as the Secretary's agents. In many respects, an intermediary does act on behalf of the Secretary in performing its duties under the Medicare program. But the Medicare statute and regulations make it quite clear that an intermediary has no authority to render final reimbursement determinations. At least within the three-year period provided under 42 C.F.R. 405.1885, the intermediary's reimbursement determinations are expressly subject to review and reversal by the Secretary. Thus, the intermediary's role as the Secretary's agent for some purposes cannot provide grounds for binding the Secretary when the intermediary renders erroneous advice.

judgment, since under the terms of the statute it bears the risk that it will be required to repay funds if the Secretary eventually concludes that payment was erroneous.

3. Respondents urge vigorously (Br. 19-20) that Travelers, the intermediary, was "grossly negligent" and that the Secretary should have pursued Travelers rather than CHS in order to obtain satisfaction for the reimbursement error. But respondents themselves argued at every stage below that Travelers' advice was correct, and even now they do not concede the correctness of the Secretary's determination that CHS should not have received the Medicare payments at issue (see Resp. Br. 13). Thus, respondents are hardly in a position to contend that the advice Travelers rendered in itself would constitute grounds for liability on Travelers' part.

Respondents suggest that Travelers acted negligently in failing to refer the question of CETA employee salaries to HHS when CHS first raised it. Travelers could have raised the issue with HHS after it first arose during a meeting in which CHS consulted Travelers about a variety of cost issues (see PRRB Record at 196-197). In retrospect perhaps Travelers should have done so. But an intermediary obviously cannot consult HHS on every point; otherwise, the intermediary system would become unwieldy and ultimately pointless. Indeed, the contract between HHS and Travelers required the latter not only to serve as a channel of communication with the Secretary, but also to make coverage and payment determinations (subject to review by the Secretary). See 42 U.S.C. (Supp. V) 1395h(a); PRRB Record at 288.[5]

[5]Contrary to respondents' suggestion, it is not evident in this case that Travelers breached any duty, contractual or otherwise, to serve as a channel of communication. The record does not indicate that CHS specifically requested in 1975 or 1976 that Travelers contact HHS about

Travelers and CHS both erred in interpreting the Secretary's regulations. But it was CHS that acted on the basis of the error by claiming reimbursement for the salaries of the CETA employees. And it was CHS, not Travelers, that actually received the funds. There is nothing unusual or unfair about the Secretary's decision to recover erroneous payments from the party that actually received them, particularly when Congress expressly provided for such recovery.[6]

In any event, respondents' focus on Travelers' alleged negligence is simply one manifestation of their repeated contention that CHS was not at "fault" in accepting double reimbursement for the CETA workers' salaries. But CHS is required to return the erroneous payments because they were not allowable under the Medicare program, not because CHS was at fault in accepting them. As we noted in our opening brief (Gov't Br. 26), Congress has authorized the Secretary to waive recoupment under other parts of the Social Security Act where the recipient of an overpayment was not at fault, but it has not done so under the Medicare program in the case of provider "reasonable cost" determinations.

4. Amici suggest (NAHC Br. 8) that allowing estoppel of the government in this case is unlikely to lead to a flood of claims. The long list of lower court decisions cited by

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the treatment of the CETA salaries; thus, Travelers might have taken the position that there was no "communication" to be channeled to the Secretary. When CHS did finally press Travelers about the question in 1977, the intermediary contacted HHS and promptly communicated HHS's reply to CHS.

[6]As we explained in our opening brief (Gov't Br. 42 n.19), it appears that the Secretary would not be able to hold an intermediary liable for payments it certifies in the absence of gross negligence or intent to defraud the government.

respondents (Br. 26-28) itself appears to disprove this suggestion.[7] Moreover, respondents assert forthrightly that the rule against estoppel of the government is "outmoded" and "socially unacceptable" (Resp. Br. 34). They acknowledge that "[p]ossibly" a court should withhold equitable relief against the government in some circumstances, but they contend that "it is difficult in even a limited way to perceive of such circumstances and the burden to prove such circumstances should rest with the government" (*id.* at 34-35). The standard they propose is that "the government may be estopped when justice so requires" (Resp. Br. 26 (quoting K. Davis, *Administrative Law Treatise* § 17.01, at 252 (1982)); see also Resp. Br. 34). It seems clear that such a principle would not be easy to contain.

5. Respondents rely ultimately on the contention that the government should not be permitted to "injure and damage" them (Resp. Br. 11) and that CHS will go out of business if the Secretary is not estopped (*id.* at 22). But the Secretary is merely seeking recovery of payments CHS was never entitled to receive and that were duplicated by funds it received under another federal program. Such a recovery simply cannot qualify as "injury" that would warrant estoppel of the Secretary.

As we explained in our opening brief (Gov't Br. 35), respondents' concerns about the effect on CHS of repayment appear to be exaggerated, since there are methods of repayment that would mitigate any hardship to CHS. In

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[7]Amici characterize *Moser* v. *United States*, 341 U.S. 41 (1951), and *United States* v. *Stinson*, 197 U.S. 200 (1905), as cases in which this Court accepted the principle of estoppel against the government. NAHC Br. 5. As we explained in our opening brief (Gov't Br. 19-20 n.6), *Moser* does not appear to involve the issue of estoppel. The decision in *Stinson* rested not on estoppel, but on the government's failure to meet its burden of proof in an action to set aside allegedly fraudulent land patents.

addition, it is difficult to believe that CHS is entirely without sources of funding other than Medicare. Respondents themselves acknowledge (Br. 5) that CHS's annual budget has risen to approximately $900,000.[8] In any event, the method of repayment is not at issue at this stage of the proceedings and need not be considered by the Court. See *Bell* v. *New Jersey*, No. 81-2125 (May 31, 1983), slip op. 5 n.4. The holding of the court of appeals, which respondents embrace, does not depend upon CHS's inability to repay the amounts unlawfully obtained under the Medicare program.

For the foregoing reasons and the additional reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

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[8]In view of respondents' explanation (Br. 4-6) that the Crawford County Commissioners encouraged the expansion of services that was made possible by the double reimbursement of CETA employees' salaries and that Medicare payments were spent for the purpose of providing needed services, it might be expected that the County or a charitable organization would be willing to help CHS in its efforts to repay the funds. Of course, if recovery of the overpayments in this case would in fact create a "major medical crisis" in Crawford County (Resp. Br. 22), HHS could be expected to take that into account in connection with its attempt to recover the funds.

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